IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2000 of 2006
Date of decision: September 22, 2006.

Smt. Guddi Devi & Anr.

...Appellant(s)

v.

Smt. Saroj Sharma

...Respondent(s)

Present: Shri S.S. Dinarpur, Advocate for the appellants.

Shri Vikas Kumar, Advocate for the caveator-respondent.

Surya Kant, J.

This regular second appeal has been preferred by the defendants against whom a suit for possession, which was dismissed by the trial court vide its judgment and decree dated 2.9.2005, has been decreed by the learned first appellate court at Sirsa vide its impugned judgment and decree dated 28.4.2006.

[2]. Briefly stated, the facts are that the respondent-plaintiff filed the present suit for possession of "about 20 sq. yards of area" measuring 44 feet in east, 44 feet in west, 5 feet in north and 2 feet 5 inches in south, marked as ABCD in red colour in the site plan appended with the plaint and also fully descripted in the head-note thereof. She also sought "permanent injunction" restraining the appellants "from occupying any part of the land shown as "ADEFGB" in the site plan. According to the respondent-plaintiff, she purchased 5 marls of land out of Square No.68, Killa No.14-

min (0K-5M) situated within the revenue estate of village Kherpur, Tehsil & District Sirsa by way of registered sale deed dated 6.3.1990. It was a vacant piece of land and was surrounded by all sides viz. a plot of Hardwari Lal on the east, area of water course being used as a passage on the west, street on the north and the house of Baldev Singh (who later on sold it) on the south.

[3]. Appellant No.1, who is the wife of appellant No.2, also purchased 166.33 square yards of area out of Sq. No.68, Killa No.8/6/1 (0K-2M) and Killa No.14/4/1/1 (0K-4M) situated in the revenue estate of village Kherpur, vide registered sale deed dated 6.9.2000. In the aforesaid sale deed (Ex.D1), it is specifically recited that on the west side of the above piece of land, there is a plot measuring 44 feet owned by Saroj Sharma, w/o Chander Shekhar, - the respondent-plaintiff. In addition, the land purchased by appellant No.1 is surrounded by 20 feet wide streets on the eastern and northern sides and house of Chander Shekhar on the southern side. It is further averred that the appellant-defendants though had purchased the above stated property knowing fully well that the plot of the respondent-plaintiff was abutting eastern side of their plot, however, they started asserting that the description of the plot in the sale deed of the respondent-plaintiff was incorrect and that the part of the plot owned by her fell in the piece of land which they had purchased on 6.9.2000. It was alleged that appellant No.2, who is a leader of the Haryana Roadways Employees Union, brought about 100 employees with him in the evening of 6.9.2000 and took forcible partial possession of the plot owned and possessed by the respondent-plaintiff, thereby compelling her to file the preset suit on 17.10.2000 under Section 6 of the Specific Relief Act.

[4]. The appellants contested the aforesaid suit by way of their

written statement dated 3.11.2000. Though, it was not disputed by them that the respondent-plaintiff did purchase a piece of land vide registered sale deed dated 6.9.1990, however, they asserted that as per the "relevant revenue record", the said piece of land does not fall in Sq. No.68, Killa No.14-min, rather it is situated in Sq. No.68, Killa No.8 with its sub-divided numbers. It was also asserted that on 15.9.2000, the subject property was demarcated by Hari Ram, a retired Kanungo, who was appointed as a Local Commissioner by the Tehsildar, who, after due notice to the parties, visited the spot and submitted his report on 24.9.2000, according to which the disputed piece of land is comprised in Sq.No. 68 and Killa No.8 and not in Sq. No.68, Killa No.14-min. Various preliminary objections with regard to the maintainability of suit were also taken. The respondent-plaintiff, in her rejoinder, contested the appellants' stand and reiterated that as per the description of the properties given in both the sale deeds, namely, one in favour of the respondent-plaintiff and the other vide which the appellants purchased their plot, the subject property falls in Killa no.14-min only. As regards to the report of the Local Commissioner appointed by the Tehsildar, it was explained that the said report is of no help as according to it Killa numbers of the area under possession of both the parties were wrong.

[5]. On the pleadings of the parties, the learned trial court framed the following issues:-

1. Whether the plaintiff is owner of five marlas of land on account of sale-deed dated 6.3.1999?OPP

2. Whether the defendant has forcibly occupied 20 sq. yards out of the suit land, shown in letter ABCD?OPP

3. Whether the plaintiff is entitled to the possession of suit

land under Section 6 of the Specific Relief Act?OPP

4. Whether the plaintiff is entitled to injunction restraining the defendant from interfering in his possession over the remaining land?OPP

5. Relief.

[6]. One additional issue No.4-A, namely, "whether the suit of the plaintiff is not maintainable in the present form?", was also framed subsequently.

[7]. It appears that during the pendency of the suit, the respondent-plaintiff wanted to raise a wall on the land shown as ADEFGB in the site plan appended with the suit, which action of her, however, was opposed by the appellants. This led the trial court to pass an order dated 4.2.2004 thereby providing police help to the respondent-plaintiff. The said order was challenged by the appellants before this Court in Civil Revision No.802 of 2004 and since their stand in the Civil Revision has a bearing on the fate of this appeal, the relevant part of order dated 4.1.2005 passed by this Court is reproduced below:-

> "The defendants-petitioners do not dispute the possession of the plaintiff over the land shown as ADEFGB. It is argued that under the garb of injunction order dated 18.4.2001, the plaintiff wants to raise construction over the portion shown as ABCD whereas it is the categorical case of the plaintiff that he is raising construction over the land shown as ADEFGB.
>
> None of the parties dispute that the plaintiff is in possession of portion ADEFGB and that plaintiff is entitled to enjoy the possession of the said portion including the raising of the wall.

> Therefore, the order passed by the learned trial court is clarified to the extent that police help, if provided, is for protection over possession of the plaintiff marked as ADEFGB and not ABCD in respect of which the plaintiff has sought possession."

[8]. In support of her claim, the respondent-plaintiff produced documents Ex.P1 to P6, which comprise a copy of the sale deed dated 6.3.1990 vide which she purchased the subject property (Ex.P1), site plan (Ex.P2), copy of mutation (Ex.P3 and P4), jamabandi (Ex.P5) and certified copy of the order dated 4.1.2005 passed by this Court in Civil Revision No.802 of 2004 (Ex.P6). In addition, oral evidence was also led. Similarly, the appellants produced documents Ex.D1 to D17, which include their sale deed (Ex.D1), applications moved by the husband of the respondent-plaintiff (Ex.D2 and D3), copy of sale deeds (Ex.D4 to D6), revenue record, including *aksh-shajra* (Ex.D7 to D10), certified copy of the order dated 2.4.2004 passed by the learned Additional District Judge on an application under Order 39 Rule 2-A CPC (Ex.D11), another set of revenue record (Ex.D14 to D17), etc. The appellants too led oral evidence.

[9]. The learned trial court, after holding that the respondent-plaintiff has failed to prove that the appellants have forcibly occupied 20 sq. yards land out of the subject land, dismissed the suit.

[10]. However, on an appeal by the respondent-plaintiff, the first appellate court held as follows:-

> "*21. However, after perusing the record and after going through the ratio laid down in the aforesaid authorities relied upon by the learned counsel for the respondents, this court is of the view that none of the aforesaid arguments advanced by the learned counsel for*

> *the respondents is found based on merits. The plaintiff/appellant has placed on record a certified copy of the sale deed dated 6.3.1990 Ex.P1 vide which she has purchased the suit property. Even in the sale deed Ex.D1 relied upon by the respondents, it has been specifically mentioned that the plot is surrounded on west by the vacant plot of Saroj Sharma (present plaintiff/appellant). The demarcation report, as observed earlier, is not a good piece of evidence as the retired Kanungo Hari Ram has not conducted the demarcation as per the procedure laid down for the purpose in High Court Rules and Orders. DW3 Hari Ram Kanungo (retired) has admitted in his cross examination that for conducting demarcation, there is necessity to locate the stones for conducting survey of Muraba line but in this case, he had not come across with any stone of Muraba Line. He has further admitted that he has conducted the demarcation from the eastern wall of the Hostel of National College taking the same to be a pucca point. He has further stated that he does not know as to how much area of this plot falls in killa no.8 and how much in killa No.14. ....*"

[11]. Before adverting to the rival contentions, it may be mentioned that during the pendency of her first appeal, the respondent-plaintiff moved an application under Order 6 Rule 17 CPC for amendment of the plaint alleging, *inter-alia*, that after dismissal of her suit by the learned trial court, the appellants have encroached upon the entire subject property and have taken forcible possession thereof. In the amended plaint, she, therefore, sought a decree for possession of portion "ADEFBG" also, which was in her possession till the suit was dismissed.

[12]. In reply to the aforesaid application, the appellants took the following stand:-

> ".. The suit property is in possession of the respondents. The suit was dismissed on 2.9.2005. Thereafter, the respondents have raised the construction of boundary walls and one room.

> The construction was completed on 4.9.2005. The same was also whitewashed thereafter on 4.9.2005. Regarding the construction, the photos are attached herewith. The matter is of very urgent nature."

In addition, the appellants also took a preliminary objection that since the suit was filed under Section 6 of the Specific Relief Relief, no appeal lies against the dismissal thereof.

[13]. The learned first appellate court, however, turned down the aforesaid objection, and having regard to the admitted position that the appellants had taken possession of the entire subject property and in view of its findings on merits, it allowed the appeal and has passed a decree for possession of not only 20 sq. yards of area shown as ABCD in red colour but also possession of portion "ADBEFG" shown in the site plan and fully descripted in the amended plaint.

[14]. Aggrieved, the defendants have preferred this appeal. Since the respondent-plaintiff entered caveat, Learned Counsel for the parties were heard at length on May 30, 2006 and again on August 7, 2006. The records were also sent for. As sought, liberty was granted to Learned Counsel for the parties to submit their written submissions and pursuant thereto they have submitted their written arguments dated 7.8.2006 and 29.8.2006 respectively.

[15]. Learned Counsel for the appellants vehemently contended that:- (i) the suit was filed under Section 6 of the Specific Relief Act, therefore, no appeal was maintainable against the dismissal thereof and as such the judgment and decree passed by the first appellate court is a nullity. Reliance has been placed upon a judgment of the Hon'ble Supreme Court in

the case of **Devasahayam (D) by LRs v. P. Savithramma & Ors.** 2005(4) RCR (Civil) 306; (ii) a specific objection in relation to maintainability of the appeal was raised before the learned first appellate court which, however, has not been dealt with and, thus, there is "non-application of mind". Reliance has also been placed upon a judgment of this Court in the case of **Surender Singh Talab v. Bua Dass**, 2005(1) RCR (Civil) 498 in which the basic ingredients in relation to maintainability of a suit under Section 6 of the Specific Relief Act were explained; (iii) the application under Order 6 Rule 17 CPC for amendment of the plaint ought not to have been entertained by the first appellate court; (iv) though, the respondent-plaintiff was allowed to amend her plaint, no opportunity to file amended written statement thereto has been afforded to the appellants; (v) the impugned judgment and decree is based upon conjectures and surmises; (vi) no reliance could be placed upon the admission, if any, made by the appellants before this Court in Civil Revision No.802 of 2004. Alternatively, the said admission pertained to the portion "ADEFBG" and it could not have been relied upon in respect of portion "ABCD"; (vii) the learned first appellate court has erroneously ignored the report of the Local Commissioner, appointed by the Tehsildar.

[16]. On the other hand, Learned Counsel for the respondent-plaintiff supported the judgment passed by the first appellate court, inter-alia, for the reasons that:- (i) the ownership of the respondent-plaintiff in respect of subject property was never disputed by the appellants and they questioned only the location there; (ii) the location and demarcation of the subject property could not have been questioned by the appellants when it is descripted and reflected in their own sale deed Ex.D1 out of which they

derive their title. Similar description is recited in the sale deed Ex.P1 dated 6.3.1990 vide which the subject property was purchased by the respondent; (iii) no reliance upon the report of the Local Commissioner, who has stated that he could not locate the pillars of Sq.No.68 and does not know as to how much area of Sq. No.68 falls in Killa No.8 or Killa no.14, could be placed; (iv) the respondent-plaintiff does not want even an inch more than what she had bought vide sale deed dated 6.3.1990 (Ex.P1) and it was for the appellants, whose sale deed was executed later in time, to prove that their vendor had a valid title as well as possession at the spot to the extent of the land which he sold to them; (v) the appellants, in Civil Revision no.802 of 2004, themselves have admitted the possession of the respondent on the portion "ADEFBG" shown in the site-plan and they cannot be permitted to wriggle out of the same by taking a totally contemptuous or frivolous plea; (vi) the amendment of the plaint was necessitated due to subsequent events, namely, forcible possession of the left out piece of the land taken by the appellants on 11.9.2005, therefore, it was rightly allowed; (vii) no new facts, except the relief clause and averments in respect of taking over the possession of the remaining part of the land by the appellants after dismissal of the respondent-plaintiff's suit, were pleaded in the amended plaint and since the appellants in reply to the application for amendment admitted the subsequent events in relation to their possession over the entire plot, no amended written statement was required to be filed by them.

[17]. After hearing Learned Counsel for the parties and going through the record, I do not find any merit in this appeal. There can be no second opinion that a suit simpliciter under Section 6 of the Specific Relief Act is oftenly called a "summary suit" as the inquiry in a such like case is

confined only to find out that the dispossession has taken place within a period of six months of the institution of the suit, irrespective of the title of the parties. If the suit is dismissed, sub-section (3) of Section 6 of the Act expressly bars maintainability of any appeal or review against such order or decree and the only effective remedy left with the aggrieved person is to institute a fresh suit to establish his title to the property and to recover possession thereof.

[18]. However, in the present case, the respondent-plaintiff sought following reliefs in her un-amended civil suit dated 17th October, 2000:-

> "(a) possession of about 20 square yards of area which is shown as ABCD in red colour in the attached plan and which measures 44 feet in East, 44 feet in West, 5 feet in North and 2 feet 5 inches in South, which is surrounded on East – partly by a vacant piece land and partly by a plot of Smt. Guddi Devi – defendant No.1, North – by the property of plaintiff No.1, South – by house of Chander Shekhar plaintiff No.2 which is comprised in Square No.68, situated in the area of village Khairpur, Tehsil and District Sirsa;
>
> (b) <u>for permanent injunction restraining the defendants from occupying any part of the land shown as "ADEFGB" in the attached plan or from interfering into the possession</u> of the plaintiff and further from encroaching upon any aforesaid area of the plaintiff;
>
> on the basis of ownership and previous possession of the plaintiff and on the basis of evidence of every other description." (emphasis applied)

[19]. It is, thus, apparent that the suit was not merely under Section 6 of the Act and a "decree for permanent injunction" on the basis of ownership and previous possession has also been sought and since the suit qua the said second relief was also dismissed by the learned trial court, I am of the considered view that a part of the decree being admittedly appealable, the first appellate court rightly entertained and was competent to adjudicate the appeal.

[20]. Pertinently, the trial court specifically framed issue No.1 to the effect, "as to whether the plaintiff is owner of 5 marlas of land on account of sale deed dated 6.3.1990, or not?" Both the parties, thus, consciously raised the plea of title; got the issue framed and led evidence in support of their respective pleas. It would, therefore, be a misnomer to descript such a suit under section 6 of the Act only. Actually, if all the four issues are read consecutively, it goes without saying that the parties were aware and keen for determination of their respective 'ownership' as well as possession over the disputed land and led oral as well as documentary evidence to substantiate their claims. Still further, the suit was filed on 17.8.2000 and was adjudicated after more than five years on 2.9.2005. One fails to understand as to how it could still be termed a "summary trial" only? Be that as it may, after the plaint was allowed to be amended due to subsequent events and it was converted into a suit for possession, the first appellate court was very much competent to entertain and adjudicate the appeal on merits.

[21]. The second contention that objection regarding non-maintainability of the appeal was raised but remained untouched by the first appellate court, appears to be contrary to the record. In para 23 of the

impugned judgment, the learned first appellate court has dealt with this contention and has repelled the same for the reasons that:- (i) the entire suit was amended and converted into a suit for possession; and (ii) in view of prayer clause (b) of the plaint whereby a decree for perpetual injunction was sought and declined by the trial court, the appeal was maintainable.

[22]. Adverting to the third contention that amendment of the plaint ought not to have been allowed by the first appellate court, it is well settled that the pleadings can be allowed to be amended in view of subsequent events, which were neither in existence nor could have been originally pleaded, especially when the urge to do substantial justice so demands. The appellants have categorically admitted that after the suit was dismissed by the trial court on 2.9.2005, they took over possession of the entire subject property on 11.9.2005. It was in view of the changed circumstances that the plaintiff-respondent was rightly permitted by the first appellate court to amend her plaint.

[23]. Similarly, the fourth contention raised by Learned Counsel for the appellants is also legally misconceived. Only a formal amendment in respect of the relief clause was allowed, permitting the respondent to seek a decree for possession regarding the entire 'subject property', for the reason that she was forcibly dispossessed from its remaining portion by the appellants after dismissal of her suit by the trial court. The said fact being undisputed, the opportunity to file an amended written statement was merely an 'empty formality', the non-observance of which has caused no prejudice to the appellants. The appellants cannot be permitted to take shelter behind inconsequential hyper-technicalities which would have only prolonged and perpetuated injustice to the respondent-plaintiff.

[24]. As regards to the fifth contention that the impugned judgment and decree are based upon conjectures and surmises, suffice to say that the respondent-plaintiff has successfully proved her ownership qua the land measuring 5 marlas purchased by her by way of registered sale deed No.5973 dated 6.3.1990 (Ex.P1). Her title or that of the previous owner has not been questioned by the appellants. While allowing the appeal, the first appellate court has minutely scrutinized the entire evidence, especially the documents on record. The fact that the location and demarcation of the respondent-plaintiff's land is described in the sale deed dated 6.9.2000 (Ex.D1), vide which the appellant No.1 purchased her land and the description of the 'subject property' as given in both the sale deeds, namely, Ex.P1 and Ex.D1 is consistent, the conclusion drawn by the first appellate court is plausible and inevitable. Likewise, the admission in respect of possession of the respondent-plaintiff over the portion “ADEFBG”, made by the appellants before this court in Civil Revision No.802 of 2004, has been rightly relied upon by the first appellate court to hold that the she was dispossessed by the appellants of the above said portion only after dismissal of the suit by the trial court.

[25]. It is quite unfortunate that the appellants and their counsel, took a totally contemptuous and derogatory plea before the first appellate court in order to wriggle out of the admission made before this court in C.R. No.802 of 2004 and argued that, “observation of the Hon'ble High Court is meaningless...”. The contention that the afore-mentioned “admission” could not be relied upon to pass a decree for possession of the area more than in respect of which the said admission was made, is also contrary to the record as the first appellate court has separately decreed the suit for possession in

respect of the portions “ADBCD”, i.e., the originally disputed portion, and the “ADEFGB”, which is fully described in the amended head-note of the plaint and regarding which the appellants had admitted the respondent's possession before this court in the Civil Revision.

[26]. The last contention of Learned Counsel for the appellants that the report of the Local Commissioner appointed by the Tehsildar has been erroneously overlooked by the first appellate court, too, is devoid of any merit. Firstly, neither the Local Commissioner was appointed by the civil court nor did it feel the necessity of obtaining any such spot inspection report. Secondly, the civil court is not bound by the report of the Local Commissioner. Thirdly, the Local Commissioner, when he appeared as a witness to support the appellants' claim, has completely demolished the credibility of his report. As per his own admission, he did not locate the pillars of Sq. No.68 and had no knowledge as to how much area fell in Sq.No.68 or in the disputed Killa Numbers. Any reliance by the civil court upon such a perfunctory and casual report would have been quite disastrous. Further, the issue regarding non-reliance upon the report of the Local Commissioner, being a pure and simple finding of fact, it does not give rise to any substantial question of law which may require adjudication by this Court.

[27]. The contention of learned counsel for the respondent-plaintiff that her sale-deed being prior in time, the plaintiff shall have a preferential right, over and above to that of a subsequent vendee like appellant No.1 to get actual physical possession of the land, also appears to be well merited. The respondent-plaintiff purchased 5 marlas land on 6.3.1990 whereas the appellant No.1 purchased after a gap of 10 years on 6.9.2000. Both pieces

of land fall in Sq. No.68, Killa No.14-min (in case of appellant No.1 a part only). Since the title of the vendor from whom the respondent-plaintiff purchased her land is not at all in dispute, she has a preferential and superior right to that of the appellant No.1 to claim possession of 5 marlas of land out of Khasra No.14-Min of Sq. No.68.

[28]. Consequently, and for the reasons mentioned above, I do not find any merit in this appeal which is accordingly dismissed, however, with no order as to costs.

September 22, 2006. [**Surya Kant**]
kadyan **Judge**